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JUDAK, JR., CLERK

IN THE

## Supreme Court of the United States

TOBER TERM, 1979

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No. 79-443

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KARIN S. QUAM, individually and as prospective  
Executrix of the Estate of HOWARD QUAM, deceased,  
*Petitioner,*

—vs.—

MOBIL OIL CORPORATION, PERTH AMBOY DRY  
DOCK CO. and INTERSTATE INDUSTRIAL PRO-  
TECTION, INC.,  
*Respondents.*

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**BRIEF FOR RESPONDENT, PERTH AMBOY  
DRY DOCK CO. IN OPPOSITION**

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**Statement**

The respondent, Perth Amboy Dry Dock Co., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 599 F.2d 42.

### Statement of the Case

For reasons unknown to anyone but petitioner's counsel, the facts developed at the trial concerning the disappearance and death of Howard Quam were sparse. To be remembered the development and presentation of these facts at the trial was entirely within the control of counsel for petitioner.

On May 3, 1976, Mobil's vessel, the M/V MOBIL CHICAGO, was moored at Perth Amboy's facility located in the State of New York. Howard Quam was employed as assistant engineer on that vessel.

On that day, May 3, 1976, a Monday, Howard Quam made two phone calls to his wife at home. The first call was a collect call made at approximately 5:50 p.m., from a pay phone on the dock owned by Perth Amboy Dry Dock Co. The second phone call was made at 7:30 p.m. The second call was not a collect call and there was no record of it presented at the trial, except the testimony of Quam's widow. It is during the second call that Howard Quam allegedly advised his wife that he was on the dock and was going back to his room on the ship to watch television. Incredibly, the next item of evidence dealing with the facts surrounding Quam's disappearance was the Certificate of Death, which gave the place of death as Richmond County, New York, time of death—May 4, 1976, cause of death—drowning, circumstances undetermined.

At the trial, no facts were developed to show when Howard Quam was last seen alive, where, by whom, and in what physical condition he was in at that time. The only evidence developed at trial concerning the facts surrounding Quam's disappearance was testimony by the widow that Mr. Quam never went anywhere without his watch and wallet, and that Howard Quam's watch and

wallet were recovered from Mr. Quam's room on board ship and returned to her at a later date. Quam's widow further testified at trial that a bottle of librium was found in his room on board the ship, and that prior to his disappearance, Howard Quam was suffering from severe hypertension and anxiety. There was absolutely no evidence concerning why, when, where or how Howard Quam entered the water.

Petitioner, in his brief, states that Quam drowned while "returning to his ship" in an area where the Court below found "some unsafe conditions to exist in and about the dock." However, there was no proof in the case that Quam was, in fact, returning to his ship when he entered the water. As stated above, there is no proof concerning why, when, where or how Howard Quam entered the water. It was petitioner's counsel who placed into evidence the Certificate of Death, which gave the place of death as Staten Island, New York—at least one mile from the ship and the dock.

There was certainly no finding by the Trial Court that an unsafe condition did in fact exist at the dock owned by Perth Amboy Dry Dock Co.

The Trial Court merely assumed for the purposes of argument that the evidence, when considered in a light most favorable to the plaintiff, might support a jury finding that Perth Amboy was negligent. However, the Court only made that assumption for the purposes of argument in order to make its discussion of the motion complete. There was never any finding by the Court below that a negligent condition did exist. And certainly, the Court below was quick to point out that there was absolutely no proof that any condition on the vessel or the dock played any part in the disappearance of Howard Quam.

Petitioner, in his statement of facts, stated "... nor was anyone present on dock, barge, or ship to witness what occurred." There were persons present on the dock and there were persons present on the vessel on both May 3, 1976 and May 4, 1976. However, counsel for petitioner failed to introduce any evidence concerning their observations. This was the choice of petitioner's counsel and most probably had to do with counsel's statement on page 15a of his brief, "and we never got to the alcohol."

### Reasons for Denying the Writ

A study of Rule 19 of the Supreme Court Rules shows that there are no special or important circumstances which would warrant granting a review on writ of certiorari in this case. This case does not involve a Court of Appeals which has rendered a decision in conflict with the decision of another Court of Appeals, nor any of the other criteria set forth in Rule 19. This case deals merely with a situation where there has been a glaring failure to produce facts or evidence upon which a recovery can be made by petitioner. Both the Trial Court and the Court of Appeals for the Second Circuit analyzed the evidence in the case and rendered a decision in accordance with decisions handed down by other courts of appeals in similar situations. The only issue dealt with by the courts below in this case were questions of evidence and the apparent insufficiency of the same to carry this case to a jury.

### POINT I

**There was no proof of any defective condition that would give rise to a recovery.**

What little evidence was presented indicates that Mr. Quam made his second phone call to his wife, returned to his room on the ship, removed his wallet and watch and thereafter entered the water and drowned.

As the Trial Court pointed out in its opinion Mr. Quam traversed the area from the ship to the phone in order to make the earlier call. In order to get from the telephone booth to the ship Howard Quam would have walked over a small portion of the dock, used a gangway with handrails to get to the floating barge, and thereafter used a second gangway with handrails to get to the ship. The record is devoid of any evidence indicating any defect on these appliances. Very few of the photographs admitted into evidence showed the condition of the aforesaid appliances. Those that did, showed them to be unobstructed and without defect. Most of the photographs introduced into evidence showed remote parts of the dock and much equipment that was obviously portable without any proof that such portable equipment was in the same place and the same condition 1½ years before, when Howard Quam disappeared. There was no proof whatsoever that remote parts of the dock shown in some photographs played any part whatsoever in this case.

The basis for the admissions of the photographs was a shaky one at best. An employee of Perth Amboy testified one year and three months after the disappearance that the pier was in approximately the same condition as it was one-year ago. At the time of this testi-



mony the photographs had not yet been taken. That deposition witness had never been confronted with the photos and asked specific questions concerning details or portable equipment shown therein. The evidence concerning the condition of the dock, floating barge and gangway between the phone booths and the ship clearly showed a safe and unobstructed walkway.

## POINT II

**There was no showing of any causal connection between any condition shown at the trial and Howard Quam's death.**

In order for plaintiff to prevail in a case such as this, there must be some showing of a causal connection between the conditions complained of and the injury or damages. Whether one applies the classic proximate cause definition,

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Federal Jury Practice and Instructions, Section 80.18.

or the more liberal definition used in Jones Act or Unseaworthiness cases,

that the defendant's negligence caused or contributed to the injury and consequent damage sustained by the plaintiff,

Federal Jury Practice and Instructions, Section 96.18.

one thing is certain, there must be some evidence to support a finding of causal connection.

In all of the cases cited by petitioner there is some evidence which shows a connection between the injury sustained and the alleged negligent or defective condition. In the case at bar there is no evidence whatsoever to support a causal relationship between any defective condition and the injury. This Court has seen fit to allow a jury to determine the question of liability only when there is some evidence, albeit slight, to support a finding that the injury was connected to some defect. However, this Court has never suggested that such a finding can be based on complete speculation, when the record is devoid of any evidence showing a causal connection. In *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, (1956), this Court made it clear that:

Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, *grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.* 350 U.S. 523, 526 (emphasis supplied)

The cases cited by petitioner in its brief are easily distinguished from the case at bar. In all of those cases there existed some evidence connecting a party's injury with a defective condition. In the *Schulz* case there was really no question that Schulz fell from one of the tugs where his street clothes were hanging. Generally, those tugs had icy decks and insufficient light.

When recovered from the water, he was wearing nothing but shorts and socks. On the night he was last seen it was ten degrees above zero. The only inference to be drawn was that he did not travel far in that weather after removing all of his clothing. Thus, the evidence established a causal connection between the defective condition and his entry into the water. It should also be remembered that in *Schulz*, the defendant conceded that he was not under the influence of alcohol, did not commit suicide, that there was no foul play, and that he met his death by accident. There was no such concession in the case at bar.

In *Larson v. U.S.*, 72 F. Supp. 137 (S.D.N.Y. 1947), the question of a causal connection between the defective gangway and plaintiff's death was not in doubt. The evidence supported such a finding.

Larson's body was found on the dock directly below the head of the gangway. Death resulted from skull fractures and other trauma caused by a fall of 15 or 20 feet. Entry in the ship's log indicated "death was result of fall from top of gangway." Based on the evidence, the court concluded:

"There seems no reasonable lurking doubt that the decedent fell from the gangway and that the gangway was an unsafe appliance."

Again, the causal connection was established.

In *Parker v. Seaboard Coastline Railroad*, 573 F. 2d 1004, the defective instrumentality was a railroad hopper car, but there was no question of causal connection since both decedents were found in the car partially covered by fertilizer and dead by suffocation. Once the determination was made that the car was unsafe, the causal connection was absolutely established.

The *Wiper* case, *Wiper v. Great Lakes Engineering Works*, 340 F. 2d 727, contains more similarities to the case at bar. Three days after his disappearance, Wiper's body was recovered in the slip where his ship had been moored. Cause of death was drowning. Negligence was conceded by the defendant. The record was completely devoid of any evidence concerning how Wiper entered the water. On that basis, the Trial Court dismissed and the Court of Appeals affirmed, finding no causal relationship between the conceded negligence and the death. The Court of Appeals was applying the law of the State of Michigan to the facts of the case—just as the law of the State of New Jersey was applied in the case at bar by the Trial Court. The dictum in the *Wiper* case indicates that had the maritime standard of causation been applied, the district court "might not" have directed a verdict. But "might not" is a long way from "would not". When considering that last proposition, it is well to remember that in *Wiper* it was reasonable to assume that Wiper entered the water at the slip since the body was found there. No assumption can be made here. The evidence shows only that the place of death was New York City, Borough of Richmond. The Certificate of Death (Exhibit No. 2) further shows that the body was "found on beach on Staten Island, circumstances undetermined." The hour of death was unknown, but the date of death was May 4, 1976, the day following the two phone calls to Mrs. Quam. So while in *Wiper* one could make an assumption of causal connection because of the place the body was found, that element is missing from the case at bar.

Even conceding that in a case such as this the causal connection need not be established as a scientific fact, there nevertheless must be *some* evidence connecting the injury and damage to the defect complained of. That causal connection is totally lacking in the instant case.

### CONCLUSION

The finding of the watch and the wallet is a strong indication that plaintiff reached a seaworthy ship and somehow entered the water from it. The only evidence concerning the place of death and date of death is indictive of the fact that wherever or whenever Quam entered the water, it was at some place other than the dock or crane barge. To have submitted this case to a jury on the state of this record would have been an invitation for them to engage in pure speculation.

Respectfully submitted,

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